Structural Composites Industries, Harsco Corporation *and* Independent Workers of North America. Case 21–CA–26921

August 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

On December 19, 1990, Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent filed exceptions and a brief in support, and the General Counsel filed cross-exceptions and a brief in support. The Respondent filed an answering brief in response to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

1. The judge found that the General Counsel did not prove the complaint allegations that the Respondent violated Section 8(a)(1) by unlawfully threatening employees with reprisals for engaging in union activity, and unlawfully interrogating employee Delgado about his authorization card solicitation. We disagree and find both to be violations of the Act. As to the former, the evidence shows that Delgado's supervisor, Elmore, commented to employee Rahe that Delgado was ''awful damn close [to a disciplinary suspension] with all this union bullshit.'' We disagree with the judge's conclusion that this remark amounted only to proof of abstract animus, but not evidence that actual employment reprisal of any kind was intended or likely for those engaging in union activity. On the contrary, this remark, even though not directed to Rahe, conveyed the impression that an employee's union activities might well result in discipline. We find this linkage between union activities and employer reprisal to be violative of Section 8(a)(1). *NKC of America*, 291 NLRB 683 (1988).

Regarding the second 8(a)(1) allegation, the evidence shows that Elmore called Delgado into a supervisor's office and questioned him as to whether he was soliciting union cards during working time. It appears that the Respondent did not have a valid no-solicitation policy in effect pursuant to which it could have legitimately prohibited the solicitation of authorization cards on the job. Furthermore, the evidence shows that various employees engaged in solicitation activities on the job with impunity. Thus, we find that under the circumstances here—where Elmore questioned Delgado in a supervisor's office, and gave no assurances regarding possible retaliation—there was a violation of Section 8(a)(1) in Elmore's interrogation of Delgado concerning his solicitation of authorization cards during worktime.

The Board's decision in *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), cited by the Respondent, is distinguishable.[2] In that case, a supervisor questioned an employee, who, like Delgado, was not an open union supporter, about her union sympathies as they were ending a conversation on another matter. The employee characterized the conversation as friendly and casual, and her relationship with the supervisor as friendly. The Board, applying the test enunciated in *Rossmore House*, 269 NLRB 1176 (1984), examined the background, the nature of information sought, the identity of the questioner, and the place and method of interrogation, and found no violation of the Act because the totality of the circumstances revealed that the interrogation did not tend to restrain, coerce, or interfere with the employee's rights guaranteed by the Act.

Here, by contrast, Delgado and Elmore had a relationship which was difficult at best, and Elmore summoned Delgado into, not his own, but a higher level supervisor's office for questioning. (Elmore had also previously demonstrated an inclination toward imposing discipline for minor offenses.) His questioning was directed solely at Delgado's union activities, and involved no other work-related business. In this context, we conclude that this was not the type of casual interaction which might be expected to occur between supervisors and employees who work closely together, as was found in *Sunnyvale*, but, under all the circumstances, demonstrated a reasonable tendency to restrain, coerce, or interfere with Delgado in the exercise of his Section 7 rights.

2. We agree with the judge's conclusion that employee Delgado was discharged in violation of Section 8(a)(3) of the Act. We note in this regard that the General Counsel established a prima facie case of discrimination by proving that Delgado was known to the Respondent as a union supporter, that he was identified as such only a few days before his discharge, and that his supervisor, Elmore, expressed strong disapproval of his union activity (as discussed above). We also agree with the judge that the timing of the discharge is strongly indicative of animus. Our dissenting colleague concludes that the Respondent has met its *Wright*

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Member Cracraft agrees that *Sunnyvale* is distinguishable but in any event would not rely on that case.

Line[3] burden of showing that the Respondent would have discharged Delgado even in the absence of union activities. We disagree. We assume arguendo that Delgado's conduct was in breach of the Respondent's rule and that he *could have* been discharged therefor.[4] However, under *Wright Line*, the question is whether the Respondent has shown that it *would have* discharged Delgado therefor. The Respondent presented no evidence that employees who had threatened supervisors or other employees in the past had been automatically discharged. Furthermore, the judge discredited Human Resources Manager Hafner's testimony that he in fact relied on the disciplinary policy in determining what penalty would be appropriate for Delgado's conduct.[5] In short, the Respondent has shown, at most, that it *could have* discharged Delgado for his alleged misconduct. It has not established, through credible testimony, that it *would have* discharged Delgado in the absence of union activities.[6]

AMENDED CONCLUSIONS OF LAW

Add the following as Conclusions of Law 3 and 4.

''3. By telling employee Rahe that employee Delgado was close to being suspended because of his involvement in union activities, the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

''4. By interrogating employee Delgado as to whether he had solicited authorization cards during worktime, the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Structural Composites Industries, Harsco Corporation, Pomona, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 1(a) and (b) and reletter the subsequent paragraphs.

''(a) Telling employees that by engaging in protected activities they may be subject to discipline.

''(b) Interrogating employees about their solicitation of authorization cards during worktime.''

2. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN STEPHENS, dissenting in part.

I agree with the majority's reversal of the judge's finding that the threat and interrogation did not violate Section 8(a)(1); however, I disagree with the majority's finding that Delgado was unlawfully discharged. While it is clear to me that antiunion animus in part motivated Delgado's discharge, I am also persuaded that he would have been terminated even absent his union activity.[1]

Delgado, upon learning that Supervisor Elmore had moved Delgado's desk to a location where Elmore would more readily be able to keep an eye on him, stated to Elmore that he would ''get even'' with him, and that he knew that Elmore lived on Baseline Street in LaVerne. He added, ''that's good to know,'' and ''just remember what I said.'' The judge rejected the Respondent's contention that this threat was serious and definite enough to justify his discharge, finding instead that Delgado was discharged as a result of his union activities. For the following reasons, I would find that the Respondent acted lawfully in discharging Delgado for threatening a supervisor.

First, although the judge was ''totally unconvinced'' by Human Resources Manager Hafner's testimony explaining that studying the Respondent's rules of conduct led him to an honest conviction that Delgado should be discharged, it is undisputed that the Respondent had in effect a written personnel policy which included a mandatory penalty of discharge for the first offense of ''threatening or intimidating other employees or supervisor.''[2] Whether or not Hafner's testimony is credited, this policy was introduced into evidence and cannot be disregarded. No evidence was presented that the policy was not in effect or that employees were unaware of it, or that it was being applied to Delgado differently than it had been applied to past violators. That being the case, I am unable to conclude that Delgado would not have been discharged in the absence of union activity. The discharge was expressly mandated by the Respondent's personnel policy.

The judge appears to disregard the policy's requirement of discharge for the first offense of threatening, as demonstrated by his focus on Delgado's prior discipline. He notes that such discipline ''did not leave

[3] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[4] Delgado, upon learning that Elmore was responsible for repositioning his desk in such a way that he would be more visible to Elmore, reacted by stating agitatedly that he would ''win the war,'' and ''get even with you,'' adding that he believed Elmore lived on Baseline Street in the town of LaVerne, that that information was ''good to remember'' and in parting stated, ''just remember what I said.''

[5] The dissent's reliance on the existence of a written personnel policy under which discharge is prescribed for ''threatening . . . other employees or supervisors'' is misplaced. The simple fact is that, based on the judge's discrediting Hafner, the policy was not applied in Delgado's case. That it could have been applied is therefore irrelevant.

[6] Member Cracraft would have accepted a non-Board settlement rejected by the majority in a separate ruling. However, for the purposes of forming majority on the issue of Delgado's termination, she reaches the merits and agrees with Member Raudabaugh that the termination violated the Act.

[1] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[2] Rule of conduct 17. The statement which precedes the list of rules indicates no discretion in handing out discipline, but reads ''[v]iolation of the following rules will result in the discipline specified.''

him poised for, or vulnerable to, termination for some new class of infraction.''[3] A careful reading of the Respondent's personnel policy and rules of conduct demonstrates that *no* prior discipline was required before an employee could be discharged for threatening others. Thus, Delgado's prior discipline for unrelated matters is irrelevant to his discharge for the offense of threatening a supervisor.

Second, it is hard to imagine how Delgado's statements to Elmore would not be construed as a threat. True, no announcement of what actual harm would come to Elmore was made, and for this reason the judge apparently concluded that the threat was too vague and ambiguous to support the discharge. In my view, however, no such specificity was required in order for a reasonable person to interpret this as a threat.[4] A statement of intent to ''get even'' with someone, coupled with a statement emphasizing the speaker's exact knowledge of the location of that person's home, implies that some retribution is intended against persons and/or property. In this workplace at least, as embodied in the rules of conduct, there was a policy of zero tolerance for such statements.[5]

Finally, there is no evidence that other employees had in the past threatened supervisors (or other employees) and had been treated more leniently than Delgado. In fact, nothing was introduced which would indicate that this rule had ever been violated before this incident. The absence of evidence concerning past misconduct resembling that which assertedly underlies a discharge cuts both ways, of course. It means that an employer is unable to show that its disciplinary action is consistent with past actions enforcing its asserted policy against such conduct; but it also means that there is no evidence of disparate treatment to contradict evidence of the policy's actual existence. When, as here, an employer introduces undisputed evidence of a published policy that was in existence before the commencement of protected activities and that unambiguously prescribes discharge as the penalty for the conduct on which the termination in question was expressly grounded, the Board does not usually ignore the undisputed evidence for lack of corroboration. See *New York Telephone*, 300 NLRB 894, 896 fn. 12 (1990), enfd. mem. (2d Cir. 1991); *Azalea Gardens Nursing Center*, 292 NLRB 683, 686 (1989).

In sum, even disregarding Hafner's testimony about how he applied the rules to Delgado, we are still left with a threat, a policy which requires discharge for threatening, a discharge, and the absence of any evidence of disparate treatment. While the timing certainly raises suspicion as to whether the discharge was motivated by union activity, and therefore justifies a finding that the General Counsel made out a prima facie case, the Respondent is still entitled, under *Wright Line*, to seek to establish that Delgado would have been discharged even absent his union activity. On the record before us, and for the reasons set forth above, I believe the Respondent has shown he would have been. I therefore dissent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or discipline employees because they engage in union or concerted activities for the purposes of collective bargaining or other mutual aid or protection in the exercise of their rights under the National Labor Relations Act.

WE WILL NOT tell employees that by engaging in protected activities they may be subject to discipline.

WE WILL NOT interrogate employees about their solicitation of authorization cards during worktime.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Albert Delgado immediate, full, and unconditional reinstatement to his former position of employment, without prejudice to his seniority or other rights and privileges; and WE WILL make him whole, with interest, for any wages or benefits he may have lost as a consequence of our discharge of him on June 14, 1989.

WE WILL notify him that we have removed from our files any reference to his discharge, and that the discipline will not be used against him in any way.

STRUCTURAL COMPOSITES INDUSTRIES,
HARSCO CORPORATION

[3] Delgado's prior discipline included reprimands for talking excessively, lack of productivity, and leaving early for a break.

[4] Contrast *Evans St. Clair, Inc.*, 278 NLRB 459 (1986) (employee's statement to supervisor, ''you're agitating me to the point where I want to commit physical violence . . . against you,'' found sufficiently threatening to justify his discharge, even though it was made in the context of a conversation about upcoming election with *Syn-Tech Window Systems*, 294 NLRB 791 (1989) (union steward's pointing finger angrily at respondent's representative and threatening him with an unspecified ''problem'' if employees' grievances were not remedied, not sufficiently egregious to remove the protections of the Act from steward's presentation of employee grievances).

[5] It bears emphasizing that, in the assessment of a *Wright Line* defense, the issue is whether the Respondent, applying *its* standards, would have discharged the employee, absent his protected activity, not whether Board members believe that the conduct for which the employee was assertedly discharged *should* be treated as a firing offense.

Robert J. DeBonis, for the General Counsel.
John S. Battenfeld (Morgan, Lewis & Bockius), of Los Angeles, California, and *David M. Sarkozy*, of Camp Hill, Pennsylvania, for the Respondent.
John Romero, of Colton, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, ADMINISTRATIVE LAW JUDGE. This case was tried at Los Angeles, California on December 7 and 8, 1989. The charge was filed on July 21, 1989, by Independent Workers of North America (the Union), and the complaint issued September 8, 1989.[1] The primary issues are whether Structural Composites Industries, Harsco Corporation (the Respondent), discharged Albert Delgado because he was engaged in union or protected concerted activities for the purposes of collective bargaining or other mutual aid or protection, while also interrogating employees regarding their union activities, threatening employees with discharge or reprisals because of their having engaged in union activities and creating the impression that employees' union activities were under surveillance, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of witnesses and after consideration of briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation engaged in the manufacture of composite pressure vessels and structures at a facility in Pomona, California, where it annually sells and ships goods and products valued in excess of $50,000 directly to customers located outside the State of California. On these admitted facts I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5).

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Summary Case Description*

Albert (Red) Delgado was employed in Respondent's shipping and receiving area from September 1987, to June 14, 1989. He worked day shift under the immediate supervision of Chuck Green. Delgado openly engaged in pro-company activity among employees during a Teamsters Union organizing effort in 1987. That effort did not succeed, however by early 1989 Delgado had come to believe that unionization would be beneficial after all.

Beginning around May 1989, he was instrumental in organizing activities supportive of the Union's desire to represent Respondent's production and maintenance employees at two separate, but adjoining, industrial facilities in Pomona. By this time Rick Elmore had been hired as Respondent's material control supervisor, with the direct intention of higher executives that he bring a more intense and effective management style to the shipping and receiving area, including its associated stockroom. In mid-June 1989, a specific altercation arose between Elmore and Delgado, the result of which led to Delgado's discharge after a day of deliberation by management. This act, plus related events preceding it, essentially comprise the case.

B. *Basis of Analysis*[2]

Delgado testified that beginning around February, he began talking with other employees about having a union for collective representation. He identified pay, general working conditions, and safety as subjects of conversation among employees at this time. Delgado testified that he informed Green of these sentiments at an early time, and repeatedly afterwards informed this supervisor of such sentiments.

In early April, Elmore orally warned Delgado about making too much idle talk with other employees. He repeated a similar oral warning in early May. On May 23 he and Green broadened this warning by orally reprimanding each material control employee for excessively idle talk and continuing lack of productivity. On the next day a specific incident led to yet another reprimand of Delgado only. He had commenced a morning break early for the purpose of starting food preparation. Elmore observed Delgado's early departure from his work station, the upshot being a written warning issued to Delgado by Green.

Around very late May, possibly early June, John Romero made contact with several of Respondent's employees relative to their interest in having a union. After preliminary discussion near Respondent's premises, Romero conducted a off-site meeting on June 7. It was attended by Delgado, his fellow inventory control colleague Norm Harris, truckdriver Chris Nuhfer, maintenance department employee John Rahe, and others. Delgado and Rahe both obtained a supply of authorization cards at this meeting. On the following day of June 8, they both secured signatures on many of their cards by soliciting among employees. Delgado testified that before the day was over, he was called into an office by Elmore, who stated that a report of his passing out cards on work time had reached management and he was to be questioned about it. Elmore testified that Delgado denied having done so. Delgado's version of this discussion is that he avoided any direct answer, following which Elmore said that he could be fired on the spot for signing people. Delgado took off work on Friday, June 9, and went with Romero to the NLRB's Regional Office in West Los Angeles. The authorization cards were submitted there in support of the Union's representation petition.

On June 9 a physical reorganization of the stockroom was completed after having been commenced early that week. By this time Harris had gone on medical leave, however a rearrangement of the desks ordinarily used by Harris and

[1] This proceeding was originally consolidated with Case 21–RC–18512, in which a secret-ballot election had been conducted August 31, 1989. The order consolidating cases, dated October 5, 1989, recited that certain challenges and objections arising from that election could best be resolved after a hearing. In the course of this hearing, representation case issues were narrowed, however, by subsequent written submission dated June 5, 1990, John Romero, on behalf of the Union as Petitioner in that case, withdrew the objections that had remained before a recommended resolution. On this basis I issued an order on August 3, 1990, severing and remanding Case 21–RC–18512 to the Regional Director.

[2] All dates and months named hereafter are in 1989, unless otherwise indicated.

Delgado in the course of their work was done. Delgado participated in the repositioning, which basically involved a return of his desk and that of Harris' to their former positions relative to viewlines from the supervisors' inner office. After Delgado left the facility on Monday, June 12, Elmore and Green realized that the configuration would not provide either of them with easy observation of Delgado. They reversed the desk positions, resulting in Delgado's desk being directly in view of both supervisors through a window.

On the morning of June 13, Delgado arrived considerably before starting time as was his custom. He testified that on seeing the configuration of desks, he approached Elmore asking why his had been changed back. Delgado recalled that Elmore said it was so he could be watched ''like a hawk.'' Delgado replied in rising emotion that it was harassment because he was fighting for the Union and employees' right to organize.

Elmore's version is that Delgado had approached scowlingly and, referring to the desk arrangement, demanded to know if this was so Elmore could ''keep a close eye'' on him. Elmore replied straightforwardly that it was, and upon this Delgado agitatedly said he would ''win the war'' and ''get even with you,'' adding that he believed Elmore lived on Baseline Street in the neighboring community of La Verne. Elmore testified that Delgado said that his knowledge of Elmore's residence location was ''good to remember,'' and after seeming to leave the office how he turned back to add ''just remember what I said.''

Nuhfer testified that on the morning of June 13 he was still in his car prior to the 8 a.m. starting time and Delgado approached him around 7:30 a.m. Delgado said he ''had some words'' with Elmore, but there being no witnesses Elmore had nothing he could do. Subsequently Delgado had appeared at Nuhfer's home with papers he hoped to have signed, but when the request was declined ''bad blood'' arose between the two of them. Nuhfer even contacted police about what seemed as a threat of family harm from Delgado. Nuhfer added that his original involvement with the Union ended after attending two meetings. He had asked pointed questions on the prospect of a labor organization's finances and decisions over strike action, resulting in his being asked to leave and not participate further.

Elmore felt severely threatened by the asserted remarks, and immediately spoke with his superior Bill West and with Paul Hafner, Respondent's human resources manager. Elmore was directed to write a memorandum of the incident, while Hafner undertook a review of personnel policies relative to employee conduct. Meanwhile, Delgado sought and obtained a meeting with Hafner to protest the perceived harassment. With Hafner's blessing he carried his complaint to Vice President and General Manager Ed Morris. When these contacts were essentially inconclusive, Delgado returned to work under assignment by Elmore.

Late that morning Elmore called Delgado into the office of West, where with these three persons present Elmore stated that Delgado was being suspended for the threatening remark. A debate ensued over whether the action was on such stated grounds or because Delgado had undertaken union activities. Delgado soon left under such suspension, but was telephoned the next day by Elmore. This supervisor advised that speaking from West's office again, he now informed Delgado that upon final consideration of events, he was being discharged for the same previously stated reason.

The personnel policies on which this action was grounded exist as a formally written, nine-page ''Rules of Conduct'' document, last approved for effectiveness in 1985 by Morris. The introductory policy statement to the list of rules reads as follows:

> The Company must establish certain mandatory guidelines designed to safeguard the best interest of all its employees. SCI employees, therefore, are expected to conduct themselves in accordance with the rules and regulations set forth herein and with common courtesy and recognition of generally understood organizational and social standards.
>
> In addition, to ensure fair treatment and protect the jobs and safety of all employees, SCI must establish rules and regulations for unacceptable employee behavior.

Enumerated types of ''unacceptable behavior'' included offense number 17—threatening or intimidating other employees or supervisor for which immediate discharge is the specified discipline, and offense number 26— stretching breaks or otherwise wasting time for which a progressive discipline sequence of oral warning, written warning, 3-day suspension and 10-day suspension is specified.

On June 8, Respondent had distributed a letter to employees signed by Morris. In pertinent part, this letter read:

> We have learned that a union may be starting an organizing drive here, and that employees may be asked to sign union authorization cards.
>
> I want you to know that *the Company is strongly opposed to any effort to unionize our employees*. We also want you to be fully informed about union authorization cards, because in the past some union organizers have not told the truth about them. Sometimes employees are told that the only purpose of signing a card is ''to receive more information.'' And some employees have complained about being coerced into signing a card. We hope that does not happen here, but want you to be knowledgeable in case it does.
>
> . . . .
>
> *What are your rights?*
>
> You have the right to sign a card if you choose to do so, and *you have an equal right to refuse to sign a card*. But before you make that decision, you should understand that it is an *important legal commitment*. From the viewpoint of your own personal interests, as well as the interests of the Company, *I recommend that you not sign a card.*

As to evidence bearing on the issue of a true motivation for Delgado's discharge, he testified that at some time in June he had entered the company lunchroom for coffee as Manufacturing Supervisor Robert (Rob) Robinson was conducting a meeting with assembled employees. Delgado only heard scattered antiunion remarks by Robinson, but recalled that these included reference to himself as ''a guy . . . organizing it.'' Robinson testified about the episode, fixing it as occurring on June 8 as he fulfilled instructions to immediately inform Spanish-speaking employees about Morris'

letter to all employees issued that day. Robinson recalled that he had assembled about a dozen such employees in the lunchroom just before the end of the day shift, and had arranged for an interpreter to translate his reading of the entire letter. He testified to noticing Delgado enter the lunchroom at some point for coffee, and to asking that he please leave because of the meeting in progress. Robinson denied having made any utterance that would associate Delgado with the Union's organizing effort.

Rahe testified to more than his organizational activities in assistance of Delgado, recalling that on or about June 9 he had made a chance inquiry to Elmore about Delgado's whereabouts that day. Rahe asked if Delgado's seeming absence was related to certain disciplinary suspensions imposed earlier that week to which Elmore assertedly replied in the negative but added that ''he's awful damn close with all the union bullshit.''[3]

Regarding postdischarge evidence,[4] Harris testified that on a date he believed was June 13, Delgado had telephoned him at home to state that he had ''got into it'' with Elmore, and told this official that he would ''get yours'' because Delgado knew where he lived. Harris also recalled Delgado saying that his remark could not be proven, because no one else was present at the time.

C. *Contentions*

General Counsel contends that on acceptance of evidence favorable to its case, the record as a whole shows a discriminatory basis for the discharge of Delgado. General Counsel points to a failure of Respondent to call Morris as a witness, and thus benefit from a predictable denial that Delgado told Morris on June 13 that he could bring a union into the plant. General Counsel also claims that the Morris' letter of June 8 constitutes animus by its strong statement of opposition to unionism. General Counsel asserts further that the timing of Delgado's discharge establishes a causal connection between it and his union activities, plus that Rahe's testimony bolsters the causal link. Finally General Counsel contends that Delgado's claimed utterance regarding Elmore's place of residence, even assuming it were made, is harmlessly ambiguous on its face as well as being a provoked reaction.

On the independent 8(a)(1) allegations, General Counsel contends that interrogating Delgado about soliciting union cards during working hours is coercive in the absence of a no-solicitation rule, or of one that was not being uniformly enforced. On a second issue of this category, the argument is made that Elmore's summarizing remark to Delgado on June 8, and his crude warning of consequences as made to Rahe on June 9, were both impermissible threats of adversity. As to the final allegation relative to creating the impression of surveillance, General Counsel contends here that statements of both Elmore and Robinson showed how Respondent was so fully informed about, or obsessively concerned with, Delgado's union activities that a reasonable assumption would be such activities were in fact under surveillance.

Respondent contends that its discharge was fully legitimate, and that any contrary view would improperly rest largely on the unreliable testimony of Delgado himself. Beyond this infirmity Respondent asserts that no convincing knowledge of Delgado's predischarge union activities has been shown, and evidence of animus on Respondent's part is also lacking. Respondent contends that in any instance Delgado's angry reaction to Elmore constituted a plain threat of physical violence under applicable case law, and was reasonably taken seriously under the circumstances and given the background against which it was uttered.

As to 8(a)(1) allegations faced, Respondent contends that the creation of an impression of surveillance accusation is insufficiently supported by the evidence. On this point Respondent argues that Elmore's investigation of the subject of soliciting cards was a valid inquiry, and could not reasonably have suggested a deliberate scheme or intention to literally spy on employees' legally guaranteed conduct. Respondent applies the same argument to testimony by Delgado that Robinson gratuitously identified him as a union activist, pointing again to its urging that Delgado be disbelieved and in any event that no corroboration has been attempted for the episode. Concerning alleged threats of reprisal, Respondent contends here that Delgado's unbelievable testimony coupled, with the same characteristic being warranted as to Rahe's, leaves this portion of the complaint utterly without proof.

D. *Credibility*

This case is well suited for application of a long-established principle pertaining to the testimony of witnesses. In *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), the court wrote:

> It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all.

This principle has been subsequently approved by the Board, subject to its scrutiny as to correct application. *Edwards Transportation Co.*, 187 NLRB 3, 4 (1970); *Wilco Energy Corp.*, 246 NLRB 851 fn. 1 (1979).

Of the several major witnesses my assessment upon close evaluation of their demeanor leads to a largely mixed determination of credibility. In some regards the discrediting of one witness is also influenced by a strong inclination to credit another where direct conflict of testimony exist between the two, or where failure to contradict another undermines veracity.

Delgado impressed me as one difficult to fully believe concerning his overall description of happenings. He testified rather contrivedly and seemed to be describing what was convenient to his case not necessarily what had truly occurred. I discredit his attribution of a statement by Elmore on June 8 about Respondent's power to abruptly fire him for obtaining authorization cards from employees, and I discredit his denial of uttering a reference to Baseline Street in the community of La Verne when excitingly speaking with Elmore on June 13. What I credit most prominently from Delgado's testimony is that he consistently and increasingly identified himself as an advocate for unionism at the plant

[3] Rahe disclosed on cross-examination that he really knew Delgado was at the NLRB that day, meaning actually to draw out from Elmore whether Delgado had been caught up in the ''rash'' of disciplinary suspensions occurring earlier that week.

[4] The transcript is corrected p. at 250, L. 6 as requested by Respondent in an unopposed motion, by changing the date June 19 to the date June 13.

in conversations taking place routinely with Green during the first half of 1990.

I find Rahe to be a witness of excellent demeanor, palpably honest-seeming and anxious to be truthful. On this basis I credit his testimony of Elmore having remarked ominously on June 9 that Delgado's absence from work that day could be related to unwanted steps towards another effort at unionizing the plant.

Elmore himself was a generally unimpressive witness. While I do believe his righteously recalled testimony of Delgado having intimated sinister awareness of Elmore's general home location, I consider much of the rest of Elmore's offerings as contributed in self-interest. He simply failed to impart a persuasive impression, and compounded this trait by suspect hesitancy at key junctures of his testimony.

Hafner is another witness for whom I have a mixed view. I generally accept his several routine denials of Delgado having claimed union activities as a reason for his increasingly turbulence experiences early and into mid-June, however I doubt and reject Hafner's testimony as to following a fair application of Respondent's disciplinary policy to Delgado's actual behavior.

Robinson was the most impressively believable witness of all who appeared. His version of the single episode in which he was involved was presented assuredly and thoroughly, giving rise in the process to a confident willingness to credit him fully. I thus reject the claim that when meeting with assembled employees on June 8 he had, in any direct or indirect way, intimated that Delgado was thought of as being involved in union activities.

Green, on the other hand, was largely unconvincing, a demeanor evaluation that is applied most significantly to discrediting his denials of having prior knowledge that Delgado grew increasing likely to become active in union activities as the months of 1989 passed.

E. *Analysis*

Under *Wright Line*, 251 NLRB 1083 (1980), affd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the General Counsel has the initial burden to prove that union or other activity protected by the Act was a motivating factor in an employer's decision to take adverse action against an employee. If the General Counsel meets this burden, the employer then has the burden to show it would have taken the same action even in the absence of the protected activity.

Here, the credited evidence is that Delgado was generally known to Respondent's agents as a supporter of unionism. This had been in Green's awareness for many months, and his close working relationship with Elmore would impute such knowledge to that highly placed supervisor. A significant factor in such general knowledge is that Delgado had actively campaigned for a pro-company result on the union question in 1987, thus displaying a capacity for action and visible inclination in collective-bargaining matters well beyond the norm for most industrial employees. On a specific basis this employer knowledge is even more vivid as with reports of Delgado's card-passing on June 8, and Elmore's harsh remark to Rahe the following day indicative of a dislike of those supporting union activities.

Elmore's credited utterance also provides evidence of employer animus toward union activities. I do not, contrary to General Counsel's contention, find this in any way established from the Morris letter of June 8. On the contrary this letter, both the quoted portion above and the letter in its entirety as evidence of record, is fully within permitted expression of views under Section 8(c).[5] However the letter does have significance as to its timing, and, more importantly, for the fact that it cannot from its terms be clearly disconnected from what Respondent may have thought about Delgado's apparent initiation of union activities. It is not convincing for Respondent to assert that the Morris letter was in response to a vaguely known ''aerospace'' union, yet make no reference to this factor, let alone that it issued the very day Respondent learned about Delgado's suspected involvement. Neither do I find that a claimed inconsistency as to no-solicitation rules provides a basis for showing employer animus. While General Counsel has successfully demonstrated from the credible testimony of Rahe that until a point in time after the mid-summer election he had randomly promoted and sold his farm products generally throughout the plant and on working time without distinction, it is not persuasive to analogize from this earnest sideline to more structured selling or soliciting.

However the flurry of mild discipline experienced by Delgado prior to his discharge was occasioned not by imperfect administration of a no-solicitation rule, but instead was rooted in the pure fact that Elmore was commissioned to, and inclined toward, a more assertive style of management. To achieve this he invoked more stringent prohibitions against casual talk between employees, and gave this emphasis by direct rebukes in the nature of oral warnings. Similarly his reprimand of Delgado for a serious abuse of break privileges reflected this same new management style.

But the issue remains whether General Counsel has nevertheless established a prima facie case even given a showing of recent discipline against Delgado. I conclude that this threshold burden has been met. The knowledge that Delgado was identified only scant days before his discharge as a chief, if not sole activist, for a new drive toward unionism is significant. The Rahe testimony defeats Respondent's scenario of Elmore having no knowledge of Delgado being involved in some form, if not soliciting on worktime, of union activities. It is coupled with Elmore's strong dismay at the prospect, and the timing of how this employee of established service with Respondent was suddenly terminated. This sufficiently permits the inference of unlawful discrimination having been Respondent's motiving reason to act as it did.

Respondent's burden of showing that the same result would have obtained even absent Delgado's union activities has not been met. The cryptic, certainly mouthy, nature of Delgado's remark to Elmore is not to be minimized, however it is as a basic matter vague and ambiguous. Supposedly Respondent's persistent dissatisfaction with Delgado existed for a variety of reasons in April and May. But no significiant action occurred until his commencement of union activities. This timing is strongly indicative of animus. Further,

[5] Because I have so fully discredited Delgado's excessive claims of conversational content, I give no weight to Respondent's failure to call Morris as a witness, particularly where the point not contradicted as to his personal discussion with Delgado has been credibly contradicted by both Elmore and Hafner as part of the same context.

Elmore's profane disgust when associating Delgado to union activities, as Rahe credibly testified he did, is in striking contrast to what otherwise manifested as a controlled, almost prim, management style in which every facet of an employment setting had its place. Given that Elmore concededly knew, from earlier advice of Green, that Delgado had previously supported Respondent's resistance to the Teamsters drive, I consider the tone and nature of this specific response to be, in a bare sense, another indicator of animus. This seems particularly plain when it is noted how Elmore now self-servingly claims Delgado to have been the worst among his work group. I am mindful that Respondent explains how application of the California Labor Code compelled it to first only suspend Delgado pending further consideration of the matter. At this point the focus shifts to Hafner and I am totally unconvinced that he has advanced a truthful explanation of how studying Respondent's rules of conduct led him to a honest conviction that Delgado should be discharged. That is also aside from the fact that prior discipline against Delgado was a mixed situation, which did not leave him poised for, or vulnerable to, termination for some new class of infraction. The facts thus known to Hafner were only the cryptic reference that possible unspecified retaliation against Elmore might occur. The context was, after all, only the positioning of a desk in the workplace, Delgado, while perhaps possessed of some quirky personal values, had not shown a disclination towards purposeful and reliable work efforts, which is why the desk was even placed in its final position.

I have considered cases authorities cited by Respondent on the 8(a)(3) issue, and find them each distinguishable or insufficiently controlling of this particular fact situation. *Evans St. Clair, Inc.*, 278 NLRB 469 (1986), was a unique fact situation not suited as precedent here. *Purolator Products*, 270 NLRB 694 (1984), was a case of such major proportions that it is not an appropriate comparison. While *Moore Co.*, 264 NLRB 1212 (1982), is a respectable citation to advance, the fact remains that *Moore* was a extremely dense fact situation of considerable interpersonal background between participants, that is insufficiently comparable to the analysis here. Accordingly, my application of the *Wright Line* doctrine is to conclude that Delgado's discharge was impermissibly unlawful under the Act.[6]

I reject General Counsel's case insofar as individual 8(a)(1) violations are claimed. As to threat of reprisal I deem the remark of Elmore to Rahe on June 9 as only proof of abstract animus, but not evidence that actual employment reprisal of any kind was intended or likely for those engaging in union activity. Relatedly Elmore's questioning of Delgado whether he solicited on work time is privileged when so limited. Respondent's citation of *Consolidated Edison Co.*, 280 NLRB 338 (1986), and *Rossmore House*, 269 NLRB 1176 (1984), correctly emphasize the doctrine that an employer is free to investigate whether union solicitations are an improper interference to necessary business function. The episode in Robinson's meeting in the lunchroom with employees did not result in credited evidence that this supervisor did anything more than urge Delgado away from his own legitimate group activity. Thus in all instances the allegations of the complaint respecting independent 8(a)(1) violations either fail as to a rationale or fail for lack of proof.

[6] I note Respondent's development of evidence that Elmore's car was vandalized in July, however no proof exists to connect this act to Delgado or to buttress the assertion that he was prone to violence.

CONCLUSIONS OF LAW

1. Structural Composites Industries, Harsco Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discriminatorily discharging Albert Delgado on June 14 because of his union and concerted activities for the purposes of collective bargaining or other mutual aid or protection, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Albert Delgado, I shall recommend that Respondent be required to offer him reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, and make him whole for any loss of earnings he may have suffered as a result of the discrimination against him. Backpay shall be computed as set forth in *F. W. Woolworth*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[7]

Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Structural Composites Industries, Harsco Corporation, Pomona, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees or otherwise discriminating in regard to their hire, tenure of employment, or any term or condition of employment because they engage in union or concerted activities for the purposes of collective bargaining or other mutual aid or protection.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Albert Delgado immediate and full reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have

[7] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharge, and notify Albert Delgado in writing that this has been done and that this disciplinary action will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Pomona, California, copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''